Saeed U Khan v Lee Kok Hooi

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-24-25 OF 1997
FAIZA TAMBY CHIK J
17 JANUARY 2000

Civil Procedure *— Reciprocal enforcement of judgments — Setting aside registration of foreign judgments — Judgment obtained in Singapore and registered as judgment of the High Court Malaya — Application for extension of time to set aside registration of foreign judgment — Whether applicant 'competent' to make the application — Whether registration of judgment valid — Whether against public policy to enforce judgment locally — Rules of the High Court 1980 O 67 r 5(3)*

The plaintiff, a Singaporean national and a resident of the Republic of Singapore, commenced an action against the defendant, a Malaysian national resident in Malaysia, in the Singapore High Court. A judgment in default of appearance was entered against the defendant and was duly registered as a judgment of the High Court of Malaya by order dated 23 April 1997 ('the order'). The order and the notice of registration of judgment were served on the defendant by way of personal service on 16 May 1997. The order stated that the defendant was at liberty to set aside the registration of the judgment within 21 days from the date of service of the notice of registration of judgment on him. By way of a summons in chambers dated 19 May 1999, the defendant applied for, inter alia: (i) an extension of time to file his application to set aside the registration of the judgment of the High Court of Singapore; and (ii) the registration of the judgment of the High Court of Singapore as a judgment of the High Court of Malaya be set aside. The issues before the court were: (i) the defendant's delay in filing the application to set aside the registration of the judgment; and (ii) the validity of the order for registration of the judgment.

Held, dismissing the application:

(1) A defendant seeking to rely on O 67 r 5(3) of the Rules of the High Court 1980 ('the RHC') must first satisfy the court that he is 'competent' to make the application. A defendant can only be competent within the meaning of O 67 r 5(3) of the RHC if the defendant's application for an extension of time is made within the time stipulated in the order for the said registration to be set aside. In the instant case the defendant did not make any effort either to set aside the order or to apply for extension of time within the stipulated 21 day time period. Instead the application for an extension of time was made after a lapse of two years. The defendant was no longer competent to make an application for an extension of time pursuant to O 67 r 5(3) of the RHC (see p 422C–E).

(2) The defendant's application for an extension of time should be dismissed on the grounds that the two years delay in filing the

application to set aside the registration of the judgment was inordinate and the defendant had failed to provide sufficient reasons to justify the exercise of the discretion of the court in his favour. Further, to grant an extension of time to the defendant after a two year delay would seriously prejudice the plaintiff (see p 426C–E).

(3) The registration of the judgment fully complied with the provision of the Reciprocal Enforcement of Judgments Act 1958 ('the Act') and O 67 of the RHC and as such the order was valid and proper and hence was enforceable against the defendant. The fact that the exact amount of interest which had accrued had not been specified could not possibly render the order a nullity. At most such an omission would merely amount to an irregularity which can be cured pursuant to O 2 r 1(1) of the RHC (see p 427B, D–E).

(4) The writ of summons was served on the defendant by way of substituted service by a private agent. It is not a requirement for the process of a foreign court to be served through the High Court in Malaysia. Since the writ of summons had been served in accordance with the Singapore Rules of Court ('SRC'), the judgment had been properly obtained and was therefore valid for registration. Order 65 of the RHC was not applicable in the present situation (see p 428G–H).

(5) The Singapore High Court had jurisdiction over the defendant as the cause of action arose in Singapore and the breach occurred in Singapore (see p 430F).

(6) The enforcement of the plaintiff's judgment would not be contrary to Malaysian public policy. So long as Singaporean process is served in accordance with the SRC, there can be no question of Singapore plaintiffs or their solicitors undermining the sovereignty of Malaysia (see p 431G).

[Bahasa Malaysia summary

Plaintif, seorang warganegara dan penduduk tetap Singapura telah memulakan tindakan terhadap pihak defendan, seorang warganegara dan penduduk tetap Malaysia di Mahkamah Tinggi Singapura. Penghakiman ingkar kehadiran telah dicatatkan terhadap defendan dan telah didaftarkan sebagai penghakiman Mahkamah Tinggi Malaya melalui satu perintah yang bertarikh 23 April 1997 ('perintah tersebut'). Perintah tersebut, bersama dengan notis pendaftaran penghakiman, telah disampaikan ke atas defendan melalui penyampaian ke diri pada 16 Mei 1997. Perintah tersebut menyatakan bahawa defendan bebas menepikan pendaftaran penghakiman tersebut dalam masa 21 hari dari tarikh penyampaian notis pendaftaran penghakiman tersebut ke atasnya. Melalui saman dalam kamar bertarikh 19 Mei 1997, defendan telah memohon, inter

alia untuk: (i) pelanjutan masa untuk memfailkan permohonannya untuk menepikan pendaftaran penghakiman Mahkaman Tinggi Singapura; dan (ii) pendaftaran penghakiman Mahkamah Tinggi Singapura sebagai penghakiman Mahkamah Tinggi Malaya diketepikan. Isu-isu dihadapan mahkamah adalah: (i) kelewatan defendan dalam memfailkan permohonan untuk menepikan pendaftaran penghakiman tersebut; dan (ii) kesahan perintah pendaftaran penghakiman tersebut.

Diputuskan, menolak permohonan tersebut:

(1) Seorang defendan yang bergantung kepada A 67 k 5(3) Kaedah-Keadah Mahkamah Tinggi 1980 ('KMT') perlu memuaskan mahkamah bahawa beliau 'kompeten' untuk membuat permohonan tersebut. Defendan hanya boleh menjadi kompeten dibawah lingkungan maksud A67 k 5(3) KMT jika permohonannya untuk perlanjutan masa dibuat di dalam had masa yang ditetapkan di dalam perintah pendaftaran penghakiman untuk menepikannya. Di dalam kes ini, defendan tidak berusaha untuk menepikan perintah tersebut, mahupun memohon perlanjutan masa dalam tempoh masa 21 hari yang ditetapkan. Sebaliknya, defendan telah membuat permohonan perlanjutan masa selepas dua tahun. Oleh itu, defendan tidak lagi kompeten untuk membuat permohonan untuk perlanjutan masa selaras dengan A 67 k 5(3) KMT (lihat ms 422C–E).

(2) Permohonan defendan untuk perlanjutan masa sepatutnya ditolak oleh kerana kelewatan dua tahun tersebut adalah keterlaluan dan defendan juga telah gagal memberi alasan-alasan yang mencukupi untuk menjustifikasikan mahkamah menggunakan budibicaranya bagi memihak beliau. Lagipun, jika defendan diberi perlanjutan masa setelah kelewatan dua tahun, ini akan memprejudiskan plaintif dengan serius (lihat ms 426C–E).

(3) Pendaftaran penghakiman tersebut mematuhi peruntukan Akta Penguatkuasa Salingan Hukuman 1958 ('Akta tersebut') dan A 67 KMT dengan sepenuhnya, dan oleh itu perintah tersebut adalah sah dan boleh dikuatkuasakan terhadap defendan. Fakta bahawa jumlah faedah yang tepat yang telah berakru tidak ditetapkan tidak dapat membatalkan perintah tersebut. Selebih-lebihnya, peninggalan tersebut hanya merupakan satu luar aturan yang boleh dipulihkan selaras dengan A 2 k 1(1) KMT (lihat ms 427B, D–E).

(4) Writ saman tersebut telah disampaikan ke atas defendan melalui penyampaian ganti oleh agen peribadi. Ia tidak menjadi keperluan supaya proses mahkamah asing disampaikan melalui Mahkamah Tinggi di Malaysia. Memandangkan writ saman tersebut telah disampaikan selaras dengan Kaedah Mahkamah Singapura

('KMS'), penghakiman tersebut telah diterima dengan betul dan oleh itu, ia adalah sah untuk pendaftaran. Aturan 65 KMT tidak boleh dipakai dalam situasi ini (lihat ms 428G–H).

(5) Mahkamah Tinggi Singapura mempunyai bidangkuasa ke atas defendan kerana kausa tindakan tersebut timbul di Singapura dan kemungkiran berlaku di Singapura (lihat ms 430F).

(6) Perlaksanaan penghakiman plaintif tidak akan melanggar polisi am Malaysia. Selagi proses Singapura disampaikan mengikut KMS, soalan-soalan plaintif-plaintif Singapura atau peguamcara-peguamcara mereka menjejaskan kedaulatan Malaysia tidak tertimbul (lihat ms 431G).]

Notes

For cases on setting aside registration of foreign judgments, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3937–3941.

Cases referred to

Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors [1991] 1 MLJ 111 (refd)

Bank Utama (M) Bhd v Sistem Bis Komputer Sdn Bhd & Ors [1994] 3 MLJ 452 (refd)

Crown Limited ACN 006973262 v Siong Dung Wong @ Johnson Wong Siong Dung [1998] 3 AMR 3164 (refd)

EG Tan & Co (Pte) (In Liquidation) v Tan Chong San [1993] 2 MLJ 256 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Muniandy a/l Thamba Kaundan & Anor v Development & Commercial Bank Berhad & Anor [1996] 1 AMR 90 (refd)

NM Rothschild & Sons (Singapore) Ltd & Ors v Vincent Tang Foo Lam 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2606 (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)

Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd [1992] 2 MLJ 146 (refd)

Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors v Pribudi Sdn Bhd & Ors [1998] 5 MLJ 108 (refd)

Tractors Malaysia (1982) Sdn Bhd v Chiew Chong Huat & Ors [1999] 2 CLJ 51 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 474 (refd)

Legislation referred to

Reciprocal Enforcement of Judgments Act 1958 s 5(1)(a)(v)

Rules of the High Court 1980 O 2 rr 1(1), 2(1), O 3 r 5(1), O 11, rr 5(8), 6, O 42 r 13, O 65, r 2, O 67, r 5(2) ,(3)
Singapore Rules of Court O 11 r 3(8)(a), r 4

Shobini Mahendra (*Zain & Co*) for the plaintiff.
Jayne Koe (*Teh & Su*) for the defendant.

Faiza Tamby Chik J: This is an appeal against the decision of the senior assistant registrar ('SAR') delivered on 6 August 1999, wherein the SAR allowed the defendant/judgment debtor's application by way of the summons in chambers dated 19 May 1999 (encl 32), for, inter alia, an order to set aside the registration of a judgment which was obtained at the High Court of the Republic of Singapore in Suit No 2028 of 1996 on 21 February 1997, which judgment was subsequently registered as a judgment of the High Court of Malaya by way of the order dated 23 April 1997.

The plaintiff/judgment creditor ('the plaintiff') is a Singaporean national and a resident of the Republic of Singapore, whilst the defendant/judgment debtor ('the defendant') is a Malaysian national resident in Malaysia. On or about 22 October 1996, the plaintiff commenced an action against the defendant in the Singapore High Court (Suit No 2028 of 1996). A writ of summons and statement of claim ('the said writ of summons') was issued against the defendant. The said writ of summons together with the order of the High Court of Singapore dated 23 October 1996 (by which the plaintiff had been given leave to serve the said writ of summons out of the jurisdiction) and the order for substituted service of the High Court of Singapore dated 18 January 1997 were subsequently served on the defendant on 30 January 1997 by way of substituted service, that is by posting the same on the front door of the defendant's office premises in Kuala Lumpur.

Thereafter, judgment in default of appearance was entered against the defendant on 21 February 1997. The judgment was duly registered as a judgment of the High Court of Malaya by way of the order of this court on 23 April 1997 (encl 4). The said order, dated 23 April 1997 and a notice of registration of judgment dated 14 May 1997 were served on the defendant by way of personal service on 16 May 1997. No attempt has been made by the defendant to set aside the Singapore High Court judgment. In determining the validity of a judgment, the court must be satisfied that all procedural requirements of the country which issued the particular judgment in question have been complied with. In this case therefore, the court must be satisfied that service of the Singapore writ on the defendant complied with the provisions in the Singapore Rules of Court ('SRC'). The fact that the relevant provisions in this case are the SRC was acknowledged by the learned judge in *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474. With respect, the learned judge in that case erred in not applying the provision of O 11 r 3(8)(a) of the SRC, by which it is provided that an originating process of Singapore may be served in accordance with r 4. Rule 4 provides that an originating process may be served by a method of service authorized by the law of that country for service of any originating process issued by that country. It cannot be disputed that service by way of a private

agent is an authorized method of service in Malaysia. It is clear therefore, that the SRC permits the service of an originating process on a defendant in Malaysia by a private agent. In the case of *United Overseas Bank Ltd v Wong Hai Ong*, the learned judge did refer to O 11 r 3(8)(a) of the SRC, but proceeded to draw a distinction between processes originating in Malaysia and foreign processes. At p 415 of the report, the learned judge stated as follows:

> Insofar as the Singapore O 11 r 3(8)(a) is concerned, it cannot be read as allowing the service of the writ in Malaysia by a private agent as that is only allowed in Malaysia in respect of processes originating in Malaysia and not to foreign process.

With respect, there is no basis for such a distinction. Order 11 r 3(8)(a) of the SRC clearly permits service of a writ in Malaysia by a private agent. Further, there is no provision in Malaysian law that prohibits the service of foreign process by a private agent.

By way of a summons in chambers dated 19 May 1999 (encl 32), the defendant applied for, inter alia, the following orders:

(i) that the defendant be granted an extension of time to file his application to set aside the registration of the judgment of the High Court of Singapore;

(ii) that the registration of the judgment of the High Court of Singapore in Suit No 2028 of 1996 dated 21 January 1997 as a judgment of the High Court of Malaya by way of the order dated 23 April 1997 be set aside.

The two broad issues before the court are as follows:

(1) The defendant's delay in filing the application to set aside the registration of the judgment; and

(2) The validity of the order for registration of the judgment dated 23 April 1997.

The defendant's delay in filing the application to set aside the registration of the judgment

It is the plaintiff's submission that the defendant's application, vide the summons in chambers dated 19 May 1999 (encl 32) should be dismissed *in limine* on the ground that it was filed outside the stipulated time period. Order 67 r 5(2) of the Rules of the High Court 1980 ('RHC') provides that every order giving leave to register a judgment 'shall state the period within which an application may be made to set aside the registration and shall contain a notification that execution on the judgment will not issue until after the expiration of that period'. In compliance with O 67 r 5(2) of the RHC, the order dated 23 April 1997 by which the judgment of the High Court of Singapore was registered as a judgment of the High Court of Malaya expressly states that the judgment debtor is at liberty to set aside the registration of the judgment within 21 days from the date of service of the notice of registration of judgment on him. It is the plaintiff's contention that the defendant's failure to comply with the time specified in the court order

for setting aside the registration of the judgment is in itself sufficient for the defendant's application to be dismissed (See *NM Rothschild & Sons (Singapore) Ltd & Ors v Vincent Tang Fook Lam* 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2606). A

The relevant provision, vis-a-vis an application for an extension of time to set aside the registration of a foreign judgment, is contained in O 67 r 5(3) of the RHC. Order 67 r 5(3) of the RHC reads as follows: B

> The court may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period (either as originally fixed or as subsequently extended) within which an application to have the registration set aside may be made.

C

It is clear that a defendant seeking to rely on the above rule must first satisfy the court that he is 'competent' to make the application within the meaning of O 67 r 5(3) of the RHC. A defendant can only be 'competent' within the meaning of O 67 r 5(3) of the RHC if the defendant's application for an extension of time is made within the time stipulated in the order for the said registration to be set aside. In the instant case, the order dated 23 April D 1997 provides that the defendant is at liberty to apply to set aside the registration within 21 days after service of the notice of registration of judgment on him. In the instant case, the notice of registration of judgment was personally served on the defendant on 16 May 1997. The defendant however, did not make any effort either to set aside the said order, or to apply for an extension of time within the stipulated 21 day time period. E Instead, the application for an extension of time by the defendant was made after a lapse of two years. The defendant is no longer competent to make an application for an extension of time pursuant to O 67 r 5(3) of the RHC.

Further the defendant may seek to rely on O 3 r 5(1) of the RHC. Order 3 r 5(1) of the RHC provides: F

> the court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

In exercising its discretion under O 3 r 5(1) of the RHC, the court should take into account certain factors, such as: G

(a) the delay in making the application;

(b) whether or not there are cogent reasons for the litigant not to have made the application within the prescribed time;

(c) the likelihood and degree of prejudice, as well as the injustice to the opposite party should the court exercise its discretion. H

In the instant case, I am of the opinion that the defendant's delay of two years in filing this application is unreasonable.

Length of delay I

In the case of *Bank Utama (M) Bhd v Sistem Bis Komputer Sdn Bhd & Ors* [1994] 3 MLJ 452, it was held that a one and a half year delay in making an

application for an extension of time was unreasonable as it would seriously prejudice the opposite party. At p 455, the court stated:

> When a court of law considers such application of this nature the facts and circumstances relating to both the delay in filing the notice of appeal and the application for enlargement of time must be taken into account and the principles as stated in the *D & C Bank* should be considered equally in both situations and as a whole. This would mean that this court should also consider the length of and reason for the delay in filing the application for enlargement of time in this case and, whether this lateness in application would prejudice the respondent.
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> Though no time limit is specified in the Rules or by any statute for the filing of an application for the enlargement of time to file a notice of appeal, by natural justice such application should be made within reasonable time. What is reasonable would depend on the circumstances. A notice of appeal may be filed two days late, but in law it is still a defective notice. What is essential then is for the party concerned to take immediate steps to file an application for enlargement of time to file the notice of appeal out of time. The longer the delay in the filing of an application of such a nature, the greater is the likelihood of prejudice to the opposite party.

In the case of *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105, the court held that a delay of four months after the expiry of the period to make the application was unreasonable. At p 106, the court stated:

> It is trite law that the court has an unfettered discretion to grant or refuse an extension of time. The first principle is that the rules of court must prima facie can be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of time.
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> In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the court exercising the discretion. On the facts of this case I was not able to honestly say that there was any valid ground for the delay and therefore refused the application for extension of time.

No cogent reasons to justify the exercise of the court's discretion

It is a settled principle that for the court to exercise its discretion under O 3 r 5(1) of the RHC, there must be cogent reasons before the court to justify an extension of time. In his affidavit, the defendant merely states that he did not take steps earlier as he was unaware that the judgment of the Singapore High Court was null and void and that the registration of the judgment was bad in law (para 17 of encl 33). I am of the view that the defendant's mistake or lack of awareness on a point of law cannot constitute sufficient grounds for granting an extension of time.

In *Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111, the court held:

> (3) The mistake of the defendant's solicitors is not a sufficient reason to grant extension of time. Neither was the first defendant's explanation

> that the third defendant was out of the country a sufficient reason to enlarge time.

and at p 116 the court further stated:

> It will be noted that in the *Gatti* case and *Palata* case, although the delay was due to the mistake of the solicitor the Court of Appeal allowed the extension of time.
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> The Federal Court, however, has taken a different stand. In *Tractors Malaysia Bhd v Southern Estates Sdn Bhd & Anor*, Mohamed Azmi FJ, as he then was, in delivering the judgment of the Federal Court said at p 121:
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> > 'In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal.'
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> See *Sri Jaya Transport Co Ltd v Fernandez*. *In Gan Hay Chong v Siow Kian Yuh & Anor*, the Federal Court held that the mistake of the appellant's solicitors in that case did not constitute a sufficient ground for granting the extension of time. In *Hoe Joe Sawmills v Sigma (Air Conditioning) Sdn Bhd*, the reason given for the application for extension of time, was the fault of the solicitor's clerk. The Federal Court decided that this was insufficient ground for the granting of special leave.
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> Although *Tractors Malaysia v Southern Estates*, *Sri Jaya Transport Co Ltd v Fernandez*, and *Gan Hay Chong v Siow Kian Yuh* were concerned with applications for extension of time to file notice of appeal to the Federal Court, in my view the principles laid down in those cases apply to the present case. There are two points to be noted in the Federal Court decisions. Firstly, the mistake of the appellant's solicitors or the solicitor's clerk is not sufficient ground to grant an extension of time. Secondly, in all those three cases affidavits were filed in support of the application for extension of time and the Federal Court took into consideration the affidavits filed in arriving at its decision. Even in the *Gatti* case and *Palata* case, the English Court of Appeal relied on the explanation contained in the applicants' affidavits before making its decision.

Counsel for the defendant submitted that delay is not a bar to the setting aside of an order which is a nullity. The plaintiff contended that whilst delay may not be an absolute bar to the setting aside of a judgment which is a nullity, the onus is on the party seeking to set aside the judgment to provide a satisfactory explanation for the delay. Counsel for the defendant relied on the Federal Court decisions in *Muniandy a/l Thamba Kaundan & Anor v Development & Commercial Bank Berhad & Anor* [1996] 1 AMR 908 and *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30. I wish to draw the attention of counsel for the defendant to the fact that in both of those cases, the Federal Court did not have regard to O 42 r 13 of the RHC as the applications to set aside the judgments/orders in the said cases had been made prior to the coming into force O 42 r 13 of the RHC. Order 42 r 13 of the RHC provides that a party intending to set aside or vary any order or judgment must make its application to the court within 30 days after the receipt of the order or judgment by it. The effect of O 42 r 13 of the RHC on the question of delay in setting aside a judgment said to be a nullity was considered by the Court of Appeal in the case of *Khor*

Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223. An extract of the judgment of Gopal Sri Ram JCA in the said case can be found in the decision of *Tractors Malaysia (1982) Sdn Bhd v Chiew Chong Huat & Ors* [1999] 2 CLJ 51 at p 84. This is what Gopal Sri Ram JCA said:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
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> *In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.*
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> The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 2 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p 36):
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> > 'The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O 2 r 2(i) of the Rules of the High Court 1980.) (Emphasis added.)'
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> The foregoing case was also an application to set aside a judgment that was irregularly obtained. The Court of Appeal dismissed the appeal against the refusal of the lower court to set aside the impugned judgment. Hence, even in an *ex debito justitiae* situation an indolent litigant is still required to give an explanation for the delay (see also *Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors* [1997] 3 CLJ Supp 372; [1998] 5 MLJ 108).

The cases of *Muniandy a/l Thamba Kaundan & Anor v Development & Commercial Bank Bhd & Anor* and *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* were both considered in the High Court case of *Tractors Malaysia (1982) Sdn Bhd v Chiew Chong Huat & Ors* [1999] 2 CLJ 51. Following the Court of Appeal's decision in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd*, it was held that even in an *ex debito justitiae* situation, an indolent litigant is still required to give an explanation for the delay. The High Court in *Tan Ewe Chong & Ors Pribudi Sdn Bhd & Ors* [1998] 5 MLJ 108 also held that delay militates against the right to set aside a judgment *ex debito justitiae*. In the instant case, there was a time limit of 21 days for the defendant to apply to set aside the registration of the judgment. The defendant failed to provide a satisfactory explanation for the two year delay in filing an application to set aside the registration of the judgment. The defendant stated that he was unaware that the Singapore judgment was null and void, as the cause papers relating to the Singapore suit were solely in

the plaintiff's hands. This explanation is insufficient as the defendant does not explain why he did not take steps to obtain copies of the cause papers from the plaintiff's solicitors within the 21 days as stipulated in the order for registration of judgment dated 23 April 1997.

It must be noted that any application to set aside the registration of a judgment must be made within the period specified in the order for registration (21 days in the instant case), or at the very least, an application for an extension of time to file an application to set aside must be made within the said time period. Order 67 r 5(3) of the RHC prescribes that all orders giving leave to register a judgment shall state a period within which an application may be made to set aside the registration. The plaintiff has been prejudiced in that the plaintiff had proceeded to issue execution proceedings in reliance on the fact that no application had been made to set aside the registration within the time limit provided for.

In short, I am of the view that the defendant's application for an extension of time should be dismissed on the grounds that the two year delay in filing the application to set aside the registration of the judgment is inordinate. The defendant has failed to provide sufficient reasons in his affidavit to justify the exercise of the discretion of the court in his favour.

Prejudice and injustice to the plaintiff

I am of the view that the time limit stipulated in the Order dated 23 April 1997 and the provisions in O 67 r 5(3) of the RHC are meant to safeguard the plaintiff's actions, in that the plaintiff is at liberty after the expiry of the stipulated time period to commence execution proceedings. To grant an extension of time to the defendant after a two year delay would seriously prejudice the plaintiff.

The validity of the order for registration of the judgment dated 23 April 1997

The defendant's application to set aside the registration of the judgment is based on the following grounds:

(a) that the order dated 23 April 1997 fails to specify the amount of interest which had accrued on the judgment as at the date of registration;

(b) that the service of the said writ of summons on the defendant is defective and that the plaintiff does not comply with O 65 of the RHC;

(c) that the defendant did not voluntarily submit to the jurisdiction of the High Court of the Republic of Singapore; and

(d) that the enforcement of the judgment would be contrary to public policy in Malaysia.

Section 5(1)(a) of the Reciprocal Enforcement of Judgments Act 1958 ('the Act') provides that the registration of a judgment shall be set aside, inter alia, if the court is satisfied that the judgment was registered in contravention of the Act.

That the order dated 23 April 1997 fails to specify the amount of interest which has accrued on the judgment as at the date of registration

In his affidavit (para 4 of encl 33), the defendant contended that the order dated 23 April 1997 (encl 4) was null and void on the grounds that the order did not state the amount of interest which had accrued on the judgment as at the date of registration. It must be noted that the registration of the judgment fully complied with the provision of the Act and O 67 of the RHC and that as such, the order dated 23 April 1997 (encl 4) is valid and proper, and hence is enforceable against the defendant. It is observed that the order dated 23 April 1997 clearly sets out the principal sum, the rate of interest and the period for which interest is payable. The provision relating to interest on judgment debts is to be found in O 42 r 13 of the SRC which reads as follows:

> Except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of 6% pa or at such other rate as the Chief Justice may from time to time direct or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied:
>
> Provided that this rule shall not apply when an order has been made under s 43(1) or (2) of the Subordinate Courts Act (Chapter 321).

In the light of this, I do not think that the fact that the exact amount of interest which has accrued was not specified cannot possibly render the order a nullity. At most, such an omission would merely amount to an irregularity which can be cured pursuant to O 2 r 1(1) of the RHC. Order 2 r 1(1) of the RHC provides:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

Order 2 r 2(1) of the RHC reads as follows:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

As set out in O 2 r 2(1) of the RHC, an application to set aside any proceedings on the grounds of irregularity has to be done within a reasonable time. In the instant case, the application to set aside the order dated 23 April 1997 was made two years after the notice of the order was served on the defendant which delay is clearly unreasonable.

In *EG Tan & Co (Pte) (In Liquidation) v Tan Chong San* [1993] 2 MLJ 256, the court held:

> In the light of the wording in O 2 r 2(1) of the Rules and decided authorities, any application to set aside any proceedings for irregularity or for being

frivolous, vexatious and an abuse of the process of court, has to be made within a reasonable time and five years, in this case, was not a reasonable time. A

The defendant in this case has had notice of the registration of the judgment since 16 May 1997 which was when the Order dated 23 April 1997 and the notice of registration of judgment were served personally on him. Further, the defendant has been represented by solicitors from as early as January 1998 in proceedings brought by the plaintiff to examine the defendant on his means to satisfy the judgment. Furthermore, the defendant had taken steps in the proceedings whilst being represented by solicitors ie the defendant attended and participated in proceedings to examine the defendant on his means to satisfy the judgment. Therefore in taking part in the said execution proceedings, the defendant has waived any irregularity. In *Fry v Moore* (1889) 23 QBD 395 the Court of Appeal said: B C

The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived. Has then the defendant waived the irregularity? He has since taken at least two steps in the action which could only be proper steps on the theory that the order for substituted service was a proper order. In the first place, the defendant took out the summons of 28 January, by which he asked that the judgment might be set aside, and that the plaintiff might be ordered to deliver a statement of claim. It is said that the defendant's brother, who then instructed a solicitor to act for him, did not know the facts, and had no authority to do what he did. In my opinion, the brother did know the facts, and, if he had no authority, the want of authority was cured by what took place afterwards. Then on 2 March another summons was taken out, after the defendant had been communicated with, and a solicitor had been properly retained to act for him, for the same purpose as the first summons. By this summons, again, the action was treated as a properly constituted action, the object being to enable the defendant to raise a defence on the merits. These two steps, as it appears to me, are so inconsistent with the notion that no action was in existence as to amount to a waiver of the irregularity in the procedure. The result, therefore, is that the writ was rightly issued, though the order for substituted service was irregular. The irregularity has, however, been waived by the defendant, and the judgment must stand. The appeal must be dismissed. D E F

The service of the said writ of summons on the defendant is defective and it did not comply with O 65 of the RHC G

The defendant in para 7 of encl 33 argued that the service of the writ of summons was defective in that it did not comply with O 65 of the RHC. The said writ of summons was served on the defendant by way of substituted service by a private agent. It is not a requirement for the process of a foreign court to be served through the High Court in Malaysia. It is observed that since the said writ of summons had been served in accordance with the SRC, the judgment had been properly obtained and was therefore valid for registration. Order 65 of the RHC does not apply in the present situation. In the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, it was held that O 65 of the RHC does not cover cases where there is no letter of request from a foreign tribunal. In that case the court said: H I

> It is clear to me that O 65 governs the position where a letter of request from a foreign tribunal requesting service had been received by the Malaysian Minister concerned and who had sent the same to the High Court with an intimation that the request be acceded to O 65 of the RHC does not cover cases where there is no letter of request from a foreign tribunal ... .

It must be noted that since the writ of summons in issue in the instant case was issued by the High Court of Singapore, it follows that the service of such legal process is to be governed by the SRC. The relevant SRC is O 11 r 3(8) which states as follows:

> Where the defendant is in Malaysia or Brunei Darussalam, the originating process —
>
> (a) may be served in accordance with Rule 4; or
>
> (b) may be sent by post or otherwise by the Registrar to the Magistrate, Registrar or other appropriate officer of any court exercising civil jurisdiction in the area in which the person to be served is said to be or to be carrying on business for service on the defendant and if it is returned with an endorsement of service and with an affidavit of such service, it shall be deemed to have been duly served.

The above O 11 r 3(8) of the SRC is similar to our O 11 r 5(8) of the RHC, save that the SRC have prescribed an additional method for foreign service, which is spelt out in O 11 r 4 of the SRC. Order 11 r 4 of the SRC is similar out O 11 r 6 of the RHC except that it provides for an additional method of service, ie:

> by a method of service authorized by the law of that country for service of any originating process issued by that country.

The writ of summons in the instant case was served on the defendant on 30 January 1997 by way of substituted service, which is a recognized method of service in Malaysia. Therefore, in reliance on O 11 r 4 of the SRC, I am of the view that the service of the said writ of summons is valid and proper in law.

It is observed that counsel for the defendant relied heavily on the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474 in support of their contention that service of the said writ of summons was bad in law. In the said case, the Malaysian High Court allowed the registration of the foreign judgment to set aside on the grounds that service of a foreign legal process through a private agent in Malaysia is not valid. It was held that 'whilst O 11 r 5(8) of the RHC allows service of our legal process in Singapore through the judicial officer of the courts there, the only permissible method of service of foreign legal process in this country, other than the method under O 65 of the RHC is through O 11 r 3(8) of the SRC, which is service through our judicial officer of the courts here'. In arriving at his decision, the learned judge in that case relied on the Supreme Court decision in the case of *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 2 MLJ 146. I am of the opinion that the decision of the Supreme Court in *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* was wrongly applied in *United Overseas*

Bank Ltd v Wong Hai Ong. With respect, the learned judge in *United Overseas Bank Ltd v Wong Hai Ong* failed to distinguish between the issue in the case of *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* and that in *United Overseas Bank Ltd v Wong Hai Ong*. In *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd*, the issue was the service of Malaysian legal process on a foreign defendant by private agents. In that case, the Supreme Court disallowed such a method on the grounds that it was not one of the prescribed methods in the Malaysian RHC (ie O 11 of the RHC). In the case of *United Overseas Bank Ltd v Wong Hai Ong*, however, as in the instant case, the issue was that of a foreign plaintiff who had served a legal process on a Malaysian defendant by way of a private agent. The Supreme Court in *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* did not address the issue of service of a foreign legal process on a Malaysian defendant. Hence, I am of the opinion that the learned judge in *United Overseas Bank Ltd v Wong Hai Ong* with respect, erred in ruling that the decision in *Sunkyong* was applicable to the case before him. It must be observed that the decision in *Sunkyong* only ruled out service of a Malaysian legal process on a foreign defendant by private agents and that the decision should be confined to similar fact situations. There is no restriction on service of a foreign process by a private agent on a defendant in Malaysia. In the instant case, the service of the legal process was made by way of substituted service, which being a mode of service that is authorized in Malaysian law, and therefore would also be lawful under O 11 r 4 of the SRC.

The defendant did not submit to the jurisdiction of the High Court of the Republic of Singapore

The defendant in his summons in chambers dated 19 May 1999 (encl 32), stated that the High Court of Singapore lacked jurisdiction in this matter as the defendant did not voluntarily submit to the jurisdiction of the High Court of Singapore. But it must be observed that the Singapore High Court did in fact have jurisdiction over the defendant as the cause of action arose in Singapore and the breach occurred in Singapore, and I therefore so rule.

That the execution of the judgment is against Malaysia's public policy

It is the defendant's contention that the execution of the judgment would be against Malaysia's public policy, and hence should be set aside pursuant to s 5(1)(a)(v) of the Act.

In the case of *United Overseas Bank Ltd v Wong Hai Ong* [1999] 1 MLJ 474, one of the grounds on which the registration of the foreign judgment was set aside was that the enforcement of that judgment was contrary to the public policy of Malaysia. In that case, the court held that the service of Singapore legal process on a defendant in Malaysia by way of a private agent was invalid as it amounted to the exercise of Singapore judicial power beyond its territorial limits. The learned judge in that case had relied on the Supreme Court decision in the case of *Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd* [1992] 2 MLJ 146. In the case of

Sunkyong International Inc v Malaysia Rubber Development Corporation Bhd, the Supreme Court decided that service of process on a foreign defendant had to comply with the provisions of O 11 of the RHC. The rationale underlying this decision was that our courts are not to exercise their judicial powers beyond their territorial limits. The learned judge's finding in the case of *United Overseas Bank Ltd v Wong Hai Ong* that enforcement of the judgment would be contrary to public policy in Malaysia was premised on this decision that service of a foreign legal process had to comply with O 11 r 3(8) of the SRC, ie that service had to be done through the appropriate judicial officer of Malaysia. The learned judge held that it would be contrary to public policy to allow the enforcement of a judgment that was obtained by a breach of the SRC. But with respect the service of a foreign process by a private agent on a defendant in Malaysia does not breach the SRC and that therefore the question of public policy does not arise. Further, the issue of enforcement of judgments in other jurisdictions is based on the concept of reciprocity. Any discrepancies between the Malaysian RHC and the SRC should be resolved by the legislatures of the respective countries. The judgment of the High Court of Singapore as well as the registration of the same in the High Court of Malaya are valid and proper in law. In the light of this, any execution of the judgment would be valid and lawful and could not possibly be contrary to the public policy of Malaysia. In *United Overseas Bank Ltd v Wong Hai Ong*, the learned judge held that it would be contrary to public policy in Malaysia to allow the enforcement of a judgment that was obtained consequent upon a failure to observe the rules. However, I am of the opinion that there has been no breach of the procedural rules in the instant case and that as such, the question of public policy does not arise. In the case of *United Overseas Bank Ltd v Wong Hai Ong*, the learned judge relied on the decision in *Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd* [1992] 3 CLJ 1531. The learned judge in *United Overseas Bank Ltd v Wong Hai Ong* commented that as far as service of Malaysian process in a foreign country is concerned, service must be by the procedure prescribed in the Malaysian RHC in order to respect the sovereignty of a foreign country. Likewise, I am of the view that for Singapore to respect Malaysian sovereignty, service of Singaporean process must be effected according to the SRC, which was done in the instant case. The enforcement of the plaintiff's judgment in the instant case would therefore surely not be contrary to Malaysian public policy. So long as a Singaporean process is served in accordance with the SRC, there can be no question of Singapore plaintiffs or their solicitors undermining the sovereignty of Malaysia as was contended by the counsel for the defendant.

Counsel for the defendant referred to the case of *Crown Limited ACN 006973262 v Siong Dung Wong @ Johnson Wong Siong Dung* [1998] 3 AMR 3164. In that case, an Australian plaintiff had issued a writ against the defendant at the county court of Victoria, which writ was subsequently served on the defendant in Malaysia by a private agent. The plaintiff then applied to register the judgment as a judgment of the High Court of Sabah and Sarawak at Sibu. The High Court at Sibu dismissed the plaintiff's application to register the said judgment primarily on the basis that the

courts in Victoria had no jurisdiction over the defendant and further, that the Supreme Court of Victoria had been deleted from the list of reciprocating countries in the first schedule to the Act. Counsel for the defendant stated that the High Court at Sibu refused to register the judgment because the plaintiff had served the writ by a private agent, which was not in compliance with O 65 of the RHC. It must be pointed out here that in *Crown Limited AN 006973262 v Siong Dung Wong @ Johnson Wong Siong Dung*, the County Court Rules of Victoria did not provide for service by a private agent in the country where service was to be effected. In view of this, the court held that the plaintiff should have complied with the provisions of O 65 r 2 of the RHC. The situation can therefore be distinguished from the instant case where the SRC clearly permitted service by a private agent.

In the premises, the defendant's application in encl 32 is hereby dismissed with costs on the ground that it was made out of time and was unreasonably delayed. The defendant has failed to set out cogent reasons in his affidavit to explain the delay. The defendant's two year delay has severely prejudiced the plaintiff, who having complied with the RHC and other laws of Malaysia in respect of the registration of the Singapore judgment, had in good faith proceeded with execution proceedings against the defendant.

I also rule that the plaintiff has fully complied with all the relevant provisions both in the Act and in the RHC.

Application dismissed.

Reported by Jafisah Jaafar